

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT -4 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0330-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
TYRELL KENNETH DEVORE,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MOHAVE COUNTY

Cause No. CR200901103

Honorable Steven F. Conn, Judge

REVIEW GRANTED; RELIEF DENIED

Jill L. Evans, Mohave County Appellate Defender
By Diane S. McCoy

Kingman
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Pursuant to a plea agreement, petitioner Tyrell Devore was convicted of one count of aggravated assault. The trial court imposed an aggravated, four-year term of imprisonment, and ordered Devore to pay \$58,243.33 in restitution to the victim.¹

¹The restitution order provided Devore “will receive credit for payments made by the co-Defendant toward the . . . restitution.”

Devore's attorney waived his client's presence at the April 2011 restitution hearing.² Devore now seeks review of the court's order summarily denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., and asks that we reduce the restitution award by the amount of \$12,146.55, or at the very least, remand for an evidentiary hearing. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 At the restitution hearing, Devore's counsel objected to the admission of a letter³ written by the victim's treating physician almost four months before the hearing but disclosed for the first time on the day of the hearing. He asserted he was "blindsided" by the "late discovery," and that "[t]here's no one to substantiate [the anticipated medical procedure], and nothing to prove that [the procedure] is actually scheduled." The victim's mother⁴ testified that the assault injuries had affected the victim's ability to work and explained that he still needed two additional medical procedures. In response to the prosecutor's question about the additional surgery which was the subject of the letter, the mother explained:

²"[T]he right to be heard as to the amount of restitution may be waived." *State v. Steffy*, 173 Ariz. 90, 93, 839 P.2d 1135, 1138 (App. 1992).

³In the letter, dated December 10, 2010, Dr. Eddie Ramirez stated: "This letter is in regards to [the victim's] surgery and the estimated cost . . . because of the assault." The estimated cost totaled \$10,192.55. This amount, combined with \$1,954 for an additional anticipated dental procedure the victim required for injuries sustained during the assault, represent the \$12,146.55 reduction Devore is requesting.

⁴Devore mistakenly states that his own mother testified at the restitution hearing.

From my understanding, when the injuries were done to his face, it had caused some breakage in his nasal passage; so this is where the infection from the eye behind his eye socket and everything comes from; because all of his nasal infection, or whatever, drains back . . . behind his eye sockets So it's to go in there and fix his nasal passage.

Acknowledging that the letter represented “a prospective expense,” the trial court nonetheless admitted it as an exhibit over Devore’s objection. Devore did not request a continuance, and the court subsequently issued its restitution order.

¶3 Devore claims the trial court improperly relied on the letter, which he contends constitutes hearsay, to award restitution for a future medical treatment. He asserts that the late disclosure denied him the “opportunity to explain or deny or conduct any independent investigation regarding the validity of the December letter,” resulting in a violation of his right to due process.⁵ He further claims the restitution order, which compensates the victim for two medical procedures that have not yet taken place and represent costs he may never incur, rendered his sentence illegal. *See State v. Whitney*, 151 Ariz. 113, 115, 726 P.2d 210, 212 (App. 1985) (improper restitution order results in illegal sentence).

¶4 The trial court has “substantial discretion according to the facts of the case” in determining the amount of restitution to be awarded. *See State v. Madrid*, 207 Ariz. 296, ¶ 5, 85 P.3d 1054, 1056 (App. 2004). “We will uphold a restitution award if it bears a reasonable relationship to the victim’s loss.” *Id.*; *see also State v. Scroggins*, 168 Ariz.

⁵Although he did not specifically characterize this as a due process argument in his petition below, Devore presented the same underlying argument, and we thus consider it on review.

8, 9, 810 P.2d 631, 632 (App. 1991) (although imposition of restitution mandatory, trial court has “discretion to set the amount of restitution according to the facts”); *see* A.R.S. §§ 13-603(C) (trial court required to order defendant to pay victim full amount of economic loss sustained), 13-804(B) (“In ordering restitution for economic loss . . . court shall consider all losses caused by . . . offenses for which the defendant has been convicted.”).

¶5 In its order denying post-conviction relief, the trial court correctly noted that Devore “could have requested a continuance of the restitution hearing to allow further examination of the document that the Court was obviously going to rely on in determining the proper amount of restitution.” The court discussed *State v. Dixon*, 216 Ariz. 18, ¶¶ 13-14, 162 P.3d 657, 660-61 (App. 2007), a case Devore cited for the proposition that a sentencing court may consider for restitution purposes information from out-of-court sources if they are disclosed to the defendant, who then has the opportunity to explain or deny it, the very right Devore claims he was denied here. Noting that *Dixon* was distinguishable in that it involved restitution ordered at sentencing rather than a restitution hearing, the court nonetheless found persuasive the fact that, like defense counsel here, *Dixon*’s attorney had failed to request a continuance to further investigate the challenged restitution evidence. *Dixon*, 216 Ariz. 18, ¶ 12, 162 P.3d at 660.

¶6 It is clear from the trial court’s order that it was influenced by defense counsel’s failure to request a continuance at the restitution hearing. Despite Devore’s suggestion otherwise, we do not find the court abused its discretion by having relied on

this factor. And, as we noted in *Dixon*, “[w]e do not reweigh the evidence on appeal.” *Id.* ¶ 14. Additionally, although we do not necessarily agree with the court that Devore failed to assert that time to further evaluate the letter would have led to a different result, Devore nonetheless has not persuaded us the court somehow bore the responsibility to sua sponte continue the restitution hearing, a notion he appears to raise for the first time on review.

¶7 As to the propriety of restitution for the anticipated medical procedure described in the letter, the trial court properly concluded “it is not the damages that are anticipated but it is the repair of the already existing damage caused by [Devore] that [is] anticipated.” Future medical expenses may be awarded as part of restitution. *See State v. Howard*, 168 Ariz. 458, 460, 815 P.2d 5, 7 (App. 1991). Restitution includes “not only those losses incurred at the time of sentencing, but also those losses reasonably anticipated to be incurred in the future as a result of the defendant’s actions.” *Id.* And *Howard* is not, as Devore suggests, significantly distinguishable on the ground that the defendant in that case failed to object in the trial court. *See id.* Additionally, to the extent Devore contends *Howard* is inapplicable because the victim in that case testified about anticipated medical expenses, the testimony of the victim’s mother explaining the anticipated procedures, accompanied by written documentation from the doctor, provided ample evidence to support the restitution award in this case. Nor, as Devore suggests, did the court abuse its discretion by failing to establish a provision whereby the restitution award could be reduced if the victim did not incur additional medical expenses. Merely

because the court in *Howard* reserved the right to adjust the amount of restitution if necessary, *see id.*, does not mean the court here was required to do so.

¶8 Given the record before us and the general propriety of ordering a defendant to pay the cost of future medical treatment, we find no abuse of discretion in the trial court's summary dismissal of Devore's petition for post-conviction relief. Therefore, we grant the petition for review but deny relief.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge